

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: January 18, 2002
Defendants.)	

BRIEF OF THE UNITED STATES' SUPPORTING THE
INTRODUCTION OF COMPUTER RECORDS PURSUANT
TO FED. R. EVID. 902(11) BUSINESS RECORD AFFIDAVIT

Pursuant to Fed. R. Evid. 902(11), the United States seeks to admit computer records prepared, kept, used and relied upon by Periodical Management Group, Inc. (PMG) in the ordinary and regular course of business.¹ As required under the Rule, the United States provided the defendants with written notice of its intent to offer certain business records into evidence under Fed R. Evid. 902(11). The underlying computer records the government seeks to admit were disclosed to the defendants over seven months ago. The United States also has disclosed to the defendants the supporting affidavits for their review.

Rule 902(11), effective beginning December 1, 2000, was created so that the foundation requirements of Rule 803(6) can be met "without the expense and inconvenience of producing time-consuming foundation witnesses." Official Committee Note to Rule 803(6). The Rule was intended to allow the same business records that could be introduced at trial by a testifying

¹ The parties have not been able to stipulate as to the authenticity of these computer records.

custodian to be introduced through an affidavit.

The affidavit supporting the admission of these PMG computer records was prepared by Bill Salomon, PMG's Vice President of Systems. In it, he certifies that the PMG computer records produced to the United States pursuant to a grand jury subpoena are business records that accurately show the complete sales history of Trinity News (an affiliate of PMG) from November 1990 through December 1995.² Salomon's affidavit first lays out the foundational requirements for Rule 803(6) by stating that: (1) the records concern acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge; (2) the records were kept in the course of PMG's regularly conducted business activity; and (3) it was the regular practice of PMG's regularly conducted business activity to make these records.

Indeed, Salomon's affidavit goes beyond what is required as foundation for Rule 803(6) by elaborating on the reliability of the system used to produce the records. Salomon's affidavit states that the computer records were relied upon in the conduct of PMG's business, their accuracy and reliability were systematically checked on a regular basis, they were produced regularly and continually, and employees were required to input accurate information. Taken together, these facts provide ample foundation for those computer records, and their printouts, to be allowed into evidence pursuant to Fed. R. Evid. 803(6) as business records.

² These computer records identify, on a month-to-month basis, each retail account serviced by Trinity News. For each such retailer, these computer records identify sales made by Trinity News by month, name, account number, address, city, state, zip and net sales.

In order for computer records to be allowed into evidence under Fed. R. Evid. 803(6), all that must be shown is that they meet the foundational requirements of Rule 803(6). The Fifth Circuit rejected the proposition that computer records are somehow less reliable than “normal” business records in United States v. Young Bros., Inc., 728 F.2d 682 (5th Cir.), cert. denied, 469 U.S. 881 (1984). In Young Brothers the appellant argued that there was a “double hearsay” problem and that the reliability of both the computer system and the person feeding the raw data into the computer had to be tested. In rejecting this argument and finding that there are no special requirements for the introduction of computer records, the Young Brothers Court stated that “[u]nder Rule 803(6), computer data compilations may be business records. They are admissible when the requirements for laying a proper foundation for their admissibility have been met.” Id. at 693-94 (citing United States v. Vela, 673 F.2d 86, 90 (5th Cir.1982); Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980); United States v. Fendley, 522 F.2d 181, 187 (5th Cir. 1975)).

The Young Brothers Court went on to state that the rule that the person testifying need not have been the preparer of the record as long as he is otherwise qualified to attest to their authenticity applies to computer-generated business records as well as to other types of business records. Id. at 694. Although Salomon was not the person inputting the underlying information into the computer program, his affidavit does address both the authenticity and reliability of the computer records. Because in Young Brothers the custodian testified that those records were maintained in the course of regularly conducted business activities, it was “clear that a proper foundation was laid for the admission of the records.” Id. Here, because Salomon’s affidavit certifies that the computer records were kept in the course of PMG’s regularly conducted

business activity, the Court should find that a proper foundation has been laid in the Fed. R. Evid. 902(11) business records affidavit so that these records are admissible into evidence pursuant to Fed. R. Evid. 803(6) as an exception to the hearsay rule.

Literally, Rule 803(6) permits admission of documents containing hearsay provided that the documents were: (1) made at or near the time of the transaction; (2) by or from information transmitted by a person with knowledge; (3) if kept in the course of a regularly conducted business activity; and (4) if it was the regular practice of that business activity to make such records. Rule 803(6) is premised on the idea that records of regularly conducted activity carry with them sufficient indicia of reliability to warrant admission. Reliability or trustworthiness is supplied by the Rule's requirements of systematic checking, of regularity and continuity which produce habits in precision, of actual experience of business in relying upon such records, or by a duty to make an accurate record as part of a continuing job or occupation. Advisory Committee Notes to Rule 803(6); United States v. Fendley, 522 F.2d 181, 189 (5th Cir. 1975).

The Fifth Circuit has held that the touchstone of admissibility under the business records exception to the hearsay rule is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence. See United States v. Duncan, 919 F.2d 981, 986 (5th Cir. 1990); Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980); United States v. Jones, 554 F.2d 251, 252 (5th Cir. 1977). Under United States v. Bourjaily, 483 U.S. 171, 175-76 (1987), it is clear that when determining, under Fed. R. Evid. 104(a), whether documents are admissible under the business records exception to the hearsay rule, a court need only be satisfied by a preponderance of the evidence that the documents at issue qualify as business records under 803(6).

Furthermore, in making its determination, the court may rely on hearsay and other evidence

normally inadmissible at trial. Id. at 177-78 (Rule 104(a) permits the court to consider any evidence whatsoever, bound only by the rules of evidence with respect to privilege).

For the foregoing reasons, pursuant to Rule 902(11), the United States respectfully urges this Court to admit the PMG computer records (found in Government's Exhibits # 12a and 12b) as business records. In its discussions with defense counsel, no legal objection was made to the form or substance of the affidavit qualifying Salomon as a custodian or the underlying records as business records. They merely stated that the government needs to call Salomon at trial. The PMG computer records, however, clearly qualify as business records, and Mr. Salomon clearly is a proper custodian. Here, having Mr. Salomon appear before the jury would accomplish nothing

other than to burden the jury and the witness, who does not live in Dallas, with unnecessary expense and inconvenience.

Respectfully Submitted,

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